APPENDIX A.

The First Opinion, Lebold v. Inland Steamship Company, 7 Cir., 82 F. (2d), 351, decided March 18, 1936.

Before Evans and Sparks, *Circuit Judges*, and Lindley, *District Judge.*

Lindley, *District Judge.*

Appellants, minority stockholders of appellee, brought this suit to enjoin appellee from taking any steps to dissolve or to discontinue its corporate existence or any other action tending to interfere with the usual operation of its business. Appellants claimed that the acts of appellee, its directors and its majority stockholder, the Inland Steel Company, were such as wrongfully to coerce appellants and to bring about legal injury to them as minority stockholders. Appellee filed its answer, and, upon hearing, the Court dismissed the bill for want of equity. This appeal followed.

Appellee, incorporated in 1911, having an outstanding capital stock of 1,600 shares, each of the par value of $100, owns and operates three steamships on the Great Lakes. Prior to May, 1935, the Inland Steel Company owned 67.5 per cent. of appellee's stock, and since that time has owned 80 per cent. thereof. Appellants own 295 shares, formerly held by their father, one of the original incorporators. P. D. Block is president and C. B. Randall the Vice-President of both appellee and the Steel Company. L. E. Block is chairman of the board of the Steel Company. L. E. Block, P. D. Block, C. B. Randall, and one of appellants comprise appellee's board of directors. A former additional director resigned when he sold his stock to the Steel Company. Thus three of appellee's executive officers and four directors are likewise executive officers and directors of its majority stockholder, the Steel Company.

Appellee's business is derived almost entirely from the Steel Company, for which it carries ore, coal, and stone. For several years preceding 1935, dividends of $150.00 per share were earned and paid, over and above all deduc-

tions for interest, depreciation, bond amortization, and other charges. The average earnings, for the years from 1925 to 1934, were $134.00 per share and the average dividends $103.00 per share. If we could capitalize the earnings upon the basis of a 6 per cent. return, the value of the shares during those nine years would have been over $2000. Upon a capitalization of the dividends upon the same basis, the value would be over $1700 per share. The net earnings have increased as the bonded indebtedness, now $220,000.00, has been reduced, and for the year 1935, up to the time of the trial, equaled those in the preceding year. There was no express contract between the two companies, but the tonnage was carried by original arrangement, succeeded by tacit understanding, at the going or market rates, which are not governed by statute but are the result of competition.

On December 21, 1934, at the annual stockholders' meeting, the subject of minority holdings for the first time was presented, when P. D. Block announced that the Steel Company had had in mind for sometime the purchase of such interests. He appointed Randall and McGean, an officer of the Pioneer Company, which likewise carried freight for the Steel Company, as a committee "to fix the value" of appellee's ships. Appellant F. M. Lebold, learning in the following January of the Steel Company's desire to acquire the minority stock, called upon Block, and was told that the committee had been appointed. In March Randall discussed with the other appellant the purchase of minority interests, saying that in arriving at a valuation earnings could not be considered; that, if the Steel Company should put the ships to hauling coal, they would earn nothing; that, if appellee should meet the lower rates being quoted by some companies, it would earn nothing; but he said, further, that the Pioneer Company had not been required to meet such lower rates.

On May 14, 1935, the committee appointed for the purpose of fixing the value of the ships submitted its report, stating that the Steel Company had said it was unwilling to continue placing traffic with appellee on the then prevailing terms, and that the committee had been appointed to consider the proposal of the steel company "to buy the minority stock" and recommending that such stock be "offered at the price of $700.00 per share." It did not report on the value of the ships. It developed that the price recommended had, in fact, been fixed by Randall,

who occupied the dual position in the two companies previously mentioned. Block stated that the desire to buy was based upon possible merger of the Steel Company with others, the possibility of enactment of a law discriminating against companies not owning their own vessels, and the fact that other shippers were transporting their freight for less money. It was not shown at any time, however, that lower rates had been actually available to the Steel Company. Randall candidly stated that, if minority stockholders did not sell at $700.00, the Steel Company, as majority stockholder, would undertake to dissolve appellee, sell its ships, and distribute the proceeds. He testified that the Steel Company would pay no more than necessary, that it would bid enough to realize $700.00 per share, but that, if a better bid should be made, it would be accepted.

Appellants said that they preferred not to sell; that they objected to selling at $700.00 per share; but that they would not refuse to sell at a fair price. Block and Randall, representing the Steel Company, refused to make any further offer or to arbitrate the value of appellants' stock. Appellants called Randall's attention to the fact that he and Block were officers of both companies, and Randall replied that, when he dealt with traffic problems, he had at heart the interests of the Steel Company, and that, in his opinion, the Steel Company had been "suckers" and had acted foolishly in permitting the minority to continue to participate in the profits.

Following appellants' refusal to accept the offer and refusal of the Steel Company to arbitrate, notice was given of a special meeting of appellee's board of directors on July 23, 1935, to act upon a resolution to pay a liquidating dividend from the liquid assets, and of a special meeting of the stockholders to consider the proposed dissolution. Thereupon appellants filed this suit to restrain the action contemplated, and a restraining order was entered. The meetings were held, but no definite action was taken. Block advised appellants that he did not see how appellants could gain anything by their action, because, if they won, there was nothing to prevent the Steel Company from placing its tonnage elsewhere. Randall testified that the motive actuating the Steel Company was the desire to avoid continuing paying dividends to the minority. He designated such payments as pouring "a golden stream to the minority stockholders." This, he said, "disturbed

him and was unfair to the Steel Company." Admitting that the Steel Company received the greater part of the dividends, he said, "I have my eye on the part that we do not get," and that, since appellants had declined the offer of $700.00 per share, he had made up his mind definitely that no more traffic would be given to appellee; that this action would result in loss by appellee, which in turn would force dissolution and liquidation. He said these statements were not made in order to coerce appellants, but to advise them of what he had in mind, and that the purpose of the Steel Company was to produce economy in transportation expense by chartering ships at a flat rate, or procuring lower rates from other carriers, or purchasing its own ships, thus assuring to itself all profits resulting from transportation. He had made no computations, however, upon any of these bases, but said that there was a surplus of ships upon the Great Lakes.

The district judge stated the law as being that, in the absence of actual fraud, a statutory percentage of stockholders may dissolve a corporation regardless of motive; that the stockholders of the Steel Company would have been justified in insisting that the situation be terminated; that the contemplated action would not effectuate a fraud upon the minority stockholders, but would bring about a pro rata distribution of assets. Pointing out that 20 per cent. of the money earned by the transportation of the Steel Company's freight was going to minority stockholders, he held that the action of the Steel Company was for its best interests; that its declared conclusion to terminate its traffic relations with appellee had been reached in good faith; that, in fixing the value of stock, the past earning record could not be considered; that the offer was fair; that, if it should be assumed that the Steel Company did intend to terminate its traffic arrangement with appellee, it would be to the best interests of all stockholders to dissolve the company.

The parties are not greatly in dispute as to the law. A West Virginia corporation can be dissolved upon vote of sixty per cent. of the shares of its capital stock, regardless of motive and expediency. Majority stockholders do not, by mere reason of their holdings, thereby become trustees for the minority stockholders under any and all situations. However, the circumstances may be such that equity will impose upon them the obligations of trustees because of their conduct. In forcing disposition of assets, they may

not overreach the minority stockholder and derive benefit from disposition of the assets, to the detriment of the minority stockholder, without being liable for the deprivation thus incurred by the latter. The minority must receive its pro rata share of the common property and the fruits of the capital investment. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099; *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765. And if, as a result of action by the majority, the latter reaps a benefit from the assets in which the minority does not share, the latter has its remedy against those thus illegally profiting at its expense, and they may be compelled to make restitution. *Jones* v. *Missouri-Edison Electric Co., supra.* Thus the majority may not force a sale to itself at less than the full value. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.), 27 F. 625. Stated otherwise, the action of the majority must be fair to the corporation, and to all stockholders thereof, for the majority becomes in effect the corporation itself and charged with the trust obligations thereof. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.) 27 F. 625. The judgment of the majority is not to be interfered with, in the absence of circumstances creating a fiduciary relationship as mentioned or effectuating a fraud upon the minority, but in examining the facts the chancellor must scrutinize them carefully. *Ervin* v. *Oregon Ry. & Nav. Co., supra.* In short, a court of equity may not interfere with the statutory right of the majority to force dissolution and sale of the assets unless the evidence discloses an unfair advantage over the minority stockholders, with resulting injury to the latter, which they are powerless to prevent.

In the trial court below, the three officers occupying dual positions with the two companies protested their good faith in what was contemplated, presented the reasons back of their action, and disclaimed any intention to benefit at the expense of the minority. They admitted that the step toward dissolution was impelled by their failure to procure the minority stock at the price fixed by themselves, but they insisted such price was fair. It is not contended that they proposed directly to appropriate the minority stockholders' pro rata share of the assets, but it is insisted that the whole project was part of a plan to force liquidation of the physical assets of a going prosperous concern and get rid of the minority stockholders by paying them the proceeds of their share of such assets, but leaving them

without any of the fruit of their investments in the way of capitalization of earnings.

It seems to us, in view of all the evidence, that not all the essentials necessary to a complete case on the part of appellants are present. There has as yet been no disposition of the assets or loss to the minority. We cannot say that there will be any such loss. Thus far, the majority, though it has admitted its motive, has done only that which the statute permits it to do, call a meeting for dissolution. This it has a legal right to do. It may proceed to a dissolution, but what will happen then or thereafter is not now before the court, and cannot now be made the basis for a finding of fraud. On the record the bill was premature, and the court below rightfully held that the evidence does not make a case within the principles which we have outlined above.

However, we do not mean to imply that the circumstances that may hereafter develop, taken in connection with what has developed, may not bring appellants within that line of authorities which recognizes a right of action for an unfair advantage taken by a majority. Though the court was justified in holding that the facts thus far do not amount to fraud, it by no means follows that what may develop in the future may not bring about such an injury to appellants as will justify a renewal of their appeal to the chancellor.

The Steamship Company is controlled, and throughout all its existence has been operated and managed, by the majority stockholder, the Steel Company. The directors, motivated by human instincts, tempted by human impulses, under their own testimony, quite obviously have their first interest in, and make their first devotion to, the dominant company. The Steamship Company is a mere incident to the Steel Company's business, and there devolves upon the latter, therefore, as a result of this relationship, the burden of the utmost of scrupulous fair dealing with the minority of the incidental company. Thus in *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765, at page 771, the court said:

> "a majority of the holders of stock owe to the minority the duty to exercise good faith, care and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just propor-

tion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery.''

The present case illustrates the possible evils arising from interlocking directorates. When, at a stockholders' meeting of the Steamship Company, a majority thereof voted for a dissolution of the corporation, in what capacity were they voting? By what desire were they motivated? The interests of which corporation were they promoting? They certainly were not casting their ballot for promotion of their own interest as stockholders of the Steamship Company, because by their ballot they were voting to put out of business and liquidate in a time of shipping depression a prosperous, going concern which had been paying 150 per cent. dividends upon capital investment, even in years of such depression. No benefit could accrue to the Steamship Company or its stockholders from the liquidation of its physical assets. What, then, was the guiding motive of the majority stockholders? Ordinarily we would say it was the desire to promote their interests as stockholders and directors of the Steel Company by bringing about 100 per cent. ownership of the Steamship Company in the Steel Company and thereby eliminating the minority stockholders and, perhaps, continuing the prosperous business of the Steamship Company.

There was at the stockholders' meeting and at the directors' meeting nobody interested in representing, protecting, or promoting the interests of the Steamship Company other than minority stockholders. Appellee was without that devoted representation to which it is entitled from its directors. It was without directors attempting to protect its corporate business. Clearly, from their own evidence, the majority were representing only the Steel Company.

It was said by the directors, who are also the directors of the Steel Company, that the latter will take away the business of the Steamship Company; but it should be remembered that, if it does so, it will thereby wipe out profits, 80 per cent. of which belongs to it, or, if it becomes the owner of all the assets of the latter, 100 per cent. It is not certain that other boats may be had at cheaper rates. It may be

that cutthroat competition has reduced shipping rates, but those paid in preceding years are the prevailing or going rates; any lower rates are less than prevailing market rates; and the Steel Company has not in the past procured the offer of any cheaper rates.

The directors of the Steel Company, who purport to represent also the stockholders of the Steamship Company, say that some of the boats will not draw the full tonnage possible with the new channels. The fact that deeper boats may be employed does not disqualify or put out of business the boats of the Steamship Company. It may make them less efficient in competition with other boats, but there is no showing that the other boats on the lakes, now out of employment, which might be purchased and used, are not equally inefficient.

We would be more favorably impressed by the protestations of good faith of appellee's officers had they in their capacity of representatives of the dominant company shown a willingness to submit to arbitration the value of appellants' minority stock. The majority stockholder may believe that it is entirely fair, but its position renders impartiality difficult, for it is compelled to say, "Let not thy right hand know what thy left hand doth." In view of the frankly admitted desire of the majority to acquire the stock of the minority, its frank confession that the payment of profits to the minority brings only chagrin and dissatisfaction to the majority, the threat that, unless the minority will sell to it at its own price, it will force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price all the physical assets, we confess to some doubt as to eventual results. That degree of fairness required of parties in a dominant situation, or of fiduciary representatives of corporations, or of majority stockholders to the minority, making legal duress impossible, must be present before a court of equity may rest quiescent.

We are of the opinion that the District Court erred in its conclusion that the price of $700.00 was a fair price for the stock of the minority, for the reason that the court concluded as a matter of law that, in determining the value, it should not take into consideration the earning record of the company. The determination of value entails necessarily consideration of all elements that enter into value—cost of physical assets, additions, depreciation and appreciation, market price, earnings, the chances of future

successful operation, and prospects of continued earnings. From evidence as to all such elements, true valuation is to be determined. The stocks of many corporations sell for less than their book values, which ordinarily are cost, plus additions and appreciation, less depreciation and obsolescence. On the other hand, the stocks of other corporations sell for many times such value.

In view of our conclusions, it is not now necessary to determine the propriety of the district court's ruling upon the application to make the Steel Company a defendant.

The court was justified in its conclusion that the presently developed circumstances are not such as to create a cause of action in appellants, and the decree, therefore, should be affirmed. But this affirmance and the dismissal by the court below will be without prejudice to the right of appellants hereafter to present the facts herein presented in connection with such further facts, if any, as bring about a situation within the doctrine recognizing causes of action in minority stockholders. With this modification the decree is

AFFIRMED.

APPENDIX B.

The Second Opinion, Lebold v. Inland Steel Company, 7 Cir., 125 F. (2d) 369, Decided December 29, 1941.

Before Evans, Sparks, *Circuit Judges,* and Lindley, *District Judge.*

Lindley, *District Judge.* Plaintiffs, minority stockholders of the Inland Steamship Company, brought suit in the District Court to recover damages claimed to have been incurred by them by reason of alleged fraudulent acts of defendant Inland Steel Company in dissolving the Steamship Company, buying its assets and appropriating its business. The theory of plaintiffs was that defendant, owning some 80 per cent of the stock of the Steamship Company, had so utilized its dominant position as majority stockholder as to force the latter company out of a prosperous going business, to bring about its dissolution and to take over its property and its business to the detriment of plaintiffs. The court dismissed the complaint and this appeal followed.

The events preceding the dissolution and sale were before us in *Lebold* v. *Inland Steamship Co.,* 7 Cir., 82 F. (2d) 351. There a bill to enjoin dissolution had been dismissed by the District Court. Upon appeal we held the complaint premature and affirmed the dismissal, without prejudice however, to the right of plaintiffs to apply for relief if developments thereafter, coupled with what had already happened, should justify such action. Neither the facts there involved nor the law there announced need repetition.

In addition to the facts presented in that record, we have here evidence of events subsequent to that decision. Throughout the duration of the litigation involved in the prior decision, the business of the Steamship Company continued without interruption or change. The operations for the year 1935, which were not in the prior record, were successful, as had been those of all earlier years, and on December 19, 1935 the directors authorized an annual dividend of $150 per share. The decision was announced on March 18, 1936. Eight days thereafter, notice of a special meeting of stockholders was given, to be held

April 2, 1936, for the purpose of dissolution. Mr. P. D. Block, president of the Steamship Company and of the Steel Company presided. Others present were L. E. Block, a director of both corporations, Randall, vice-president, director and manager of the transportation business of the Steamship Company and also vice-president and director of the Steel Company, E. L. Ryerson, Jr., director of both companies, Morris, employee of the Steel Company and secretary of the Steamship Company, Truesdale of the Steel Company and Mullen and plaintiffs, minority stockholders, and counsel for the Inland Steel Company. Over the negative vote of the minority stockholders, a resolution was adopted directing dissolution of the Steamship Company. Block stated that the reason for such action had been submitted before and that he saw no good reason for "rehashing" it. One of plaintiffs asked Randall whether the Steamship Company had been given opportunity to bid for the Steel Company freight traffic or whether, as a director of the Steamship Company, he had made an effort to get the traffic on a competitive basis with other bids received. Randall replied that he had been instructed by President Block that "under no circumstances" did he, Block, wish to transact any business with the Steamship Company. Plaintiffs requested that the minutes reflect the fact that the Steamship Company had been given no opportunity to bid on carrying freight for the Steel Company. Block observed that the meeting was a Steamship Company meeting and not one of the Steel Company and that "they were not obligated to give any information concerning" the latter. Randall went so far as to say that but for his courtesy, he would not have replied to the question. At the trial Randall testified that he had made no effort to secure traffic for the Steamship Company from any sources other than from the Steel Company because that company had kept the Steamship Company's boats busy during 1934 and 1935. He said further that when he became "certain of dissolution," he made no effort to get traffic for the Steamship Company on the theory that it might be able to continue in business. Later a directors' meeting was held on April 14, 1936, attended by the Blocks, Randall and Foreman Lebold. The latter did not vote. The directors authorized a sale of all assets on May 1. At that time the Steel Company bid in the three boats owned by the Steamship Company at $1,120,000, apparently their fair value. There were no other bidders. Defendant immediately took over the boats. It continued the transportation

business formerly conducted by the Steamship Company and has carried it on without interruption or change, continuously, ever since.

The master found that plaintiffs were entitled only to their pro rata share of the proceeds of sale of the boats. The court agreed and dismissal followed. Plaintiffs insist that the District Court failed to apprehend the purport of and give effect to this court's decision and to draw from the facts in the record proper legal conclusions.

At the outset, giving consideration to the facts involved in the former proceeding and those presented for the first time, it is well to keep in mind that at all of the stockholders' meetings and directors' meetings involved, the majority stockholder, defendant, was in control. Defendant, owning 80 per cent of the stock, had the power to determine and did determine the actions of the Steamship Company. It is perfectly apparent, indeed, the officers of defendant themselves indicate that their interest was to force dissolution so that they might get rid of the minority interest and take over the assets and business of the Steamship Company. It is only with this elementary indisputable premise in mind that the proper answer to the controversy can be reached.

The directors of a corporation represent it and its stockholders; the majority stockholders of a corporation represent it and its minority stockholders. The vote of every director and of every majority stockholder must be directed to and controlled by the guiding question of what is best for the corporation, for which he is, to all legal intents and purposes, trustee. In his voting, in his management, he is bound to be wholeheartedly, earnestly and honestly faithful to his corporation and its best interests; his own selfish interests must be ignored. If when he votes he does so against the interest of his company, against the interest of his minority and in favor of his own interest, by such selfish action, by omission of fidelity to his own duty as a trustee, he forfeits approval in a court of equity. When the Blocks and Randall voted in the Steamship Company meeting they were within their statutory right to force a dissolution, but no legislative enactment could endow them with the right as trustees for the minority stockholders to take over for their own, through any legal device, plan or method all assets and all business of the company for which they were fiduciaries, if to do so was clearly and obviously against the best in-

terests of the company and the minority stockholders. Obviously and admittedly these gentlemen were not thinking of the Steamship Company's interest; they were wholly ignoring it. Their sole interest lay in the Steel Company and, in the words of Randall, it "griped them to see that the minority stockholders were enjoying any profit." Therefore, we must accept the obvious fact, namely, that defendant and its officials, failing to perform their duties as stockholders and directors of the Steamship Company, were faithless to that company and to the minority stockholders. The latter were powerless to help themselves; they rightfully complain of the breach of trust upon the part of defendant resulting in damage.

In *Pepper* v. *Litton,* 308 U. S. 295 at page 306, 60 S. Ct. 238, 245, 84 L. Ed. 281, Mr. Justice Douglas, discussing the responsibility of directors and of dominant or controlling stockholders, said: "A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 588, 23 L. Ed. 328. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 492, 39 S. Ct. 533, 537, 63 L. Ed. 1099. Their powers are powers in trust. See *Jackson* v. *Ludeling,* 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Co.,* 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. * * * He who is in such a fiduciary position *cannot serve himself first and his cestuis second.* He can not manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. * * * He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical require-

ments. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis." Here the strategic position of defendant was used solely for its own preferment; the affairs of the corporation were "manipulated" to plaintiffs' detriment. Here defendant did "indirectly through the corporation what it could not do directly."

Defendant says it has not appropriated the business of the Steamship Company. The statutes of West Virginia, Sec. 80, Chap. 31, Art. 1, W. Va. Code of 1931, which control the dissolution proceedings, authorize the majority to dissolve and "discontinue the business of the corporation." Here the business was not discontinued; defendant took over the boats, it continued to operate them, it continued to devote them to the same transportation that they had always carried on. The business which had been prosperous for twenty-five years was turned over to defendant. By its strategic position, by its dominant situation, it could and did force a sale, bid in the property itself and thereafter continue to operate the business as before. The Steamship Company had been organized many years before to transport freight for hire; it had transported only the freight of defendant; this it continues to do, the only difference being that now the latter realizes all the profit which results from such transportation and the minority stockholders get none of it.

This transportation business was in no wise the business of the Steel Company. It was the business carried on by the Steamship Company, a business which the defendant expressly said it was going to put out of existence. In its strategic position of dominance, even though it was trustee for the minority stockholders, defendant warned plaintiffs that if they did not sell their stock, the Steel Company would end all business relations with the Steamship Company and that they must either sell their stock or see the Steamship Company go out of business. That these threats were not idle, that they were made with the ulterior motive, to bring duress to bear and to force plaintiffs, is now obvious. The business was never interrupted, never curtailed, never modified but continued without interruption.

What defendant might have accomplished under color of the West Virginia statute was discontinuance of the busi-

ness. What it did, was to take, through form of a sale, the physical assets and the entire business of the Steamship Company. Whether we stamp the happenings as dissolution or with some other name, equity looks to the essential character and result to determine whether there has been faithlessness and fraud upon the part of the fiduciary. However proper a plan may be legally, a majority stockholder can not, under its color, appropriate a business belonging to a corporation to the detriment of the minority stockholder. The socalled dissolution was a mere device by means of which defendant appropriated for itself the transportation business of the Steamship Company to the detriment of plaintiffs. That the source of this power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. *Allied Chemical & Dye Corp.* v. *Steel & Tube Co. of America,* 14 Del. 1, 120 A. 486. The books are full of instances of disapproval of such action. If it be an absorption by the dominant member of all the returns of the corporate investment, or a sale of the property to oneself for an inadequate consideration, or deprivation by a syndicate formed to freeze out a minority stockholder through sale and dissolution or if the buyer and seller are the same, the right of a stockholder to vote becomes a power in trust when he owns the majority and assumes and exercises domination and control over corporate affairs. Such majority stockholders' vote "must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders." *Thurmond* v. *Paragon Colliery Co.,* 82 W. Va. 49, 95 S. E. 816. See, also, *Jackson* v. *Ludeling,* 21 Wall. 616, 88 U. S. 616, 22 L. Ed. 492; *Lebold* v. *Inland Steamship Co.,* 7 Cir., 82 F. 2d 351; *Ervin* v. *Oregon Ry. & Nav. Co.,* C. C., 27 F. 625; *Wheeler* v. *Abilene Nat. Bank,* 10 Cir., 159 F. 391, 16 L. R. A., N. S., 892, 14 Ann. Cas. 917; *Lehigh Valley Transit Co.* v. *Zanes,* 3 Cir., 46 F. 2d 848; *Jones* v. *Missouri-Edison Electric Co.,* 8 Cir., 144 F. 765; *Wheeler & Lake Erie R. R. Co.* v. *Carpenter,* 6 Cir., 218 F. 273; *Board of Highway Commissioners* v. *Bloomington,* 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; *Dowling* v. *Charleston & W. C. R. Co.,* 105 S. C. 475, 81 S. E. 313; Rohrlich, "Corporate Control by Minority Stockholders," 81 Pa. Law Review 728.

Furthermore it seems to us that defendant may not be permitted to say that there were no values other than those of physical assets. By taking over the assets and

by continuing the prosperous business of its former cestui trust defendant has removed itself from the place where it is permissible for it to contend that there is no prosperous business. That there was value over and above physical assets is perfectly obvious from the fact that a prosperous business existed and is still being conducted; that plaintiffs, if they had not been deprived of their interest, would be still sharing in the returns from that business and that at the present time all the profits of such are being enjoyed by defendant to the total exclusion of plaintiffs.

It follows that the true rule for determination of the value of plaintiffs' interest must be based upon the value not of the physical assets alone but upon all the elements mentioned in our former opinion and in arriving at such value, all those elements, including value as a going concern, must be taken into consideration. In twenty-five years the business of the Steamship Company has never ceased to be a going concern. It has been extremely prosperous. It continues to be so without threat of interruption. In this going concern plaintiffs had an interest.

Fortunately the testimony of the various witnesses of the respective parties is not greatly in controversy when this rule is followed. Plaintiffs produced testimony that, considering the earnings in the past and assuming that the business would continue to be in the future within a reasonable degree what it had been in the past, the shares of stock were worth at least \$1500 each. Defendant's witnesses testified that, on the assumption that traffic relationship between the Steamship Company and the Steel Company were severed, the value of the stock would be the value of the ships. One added that if he could assume that the company would continue to earn the same amount as it had earned in the past, the value would be \$2500 a share. Another of its witnesses testified that, assuming that defendant could at any time discontinue using these particular ships, the value of the stock would depend entirely upon the value of the physical assets; that he had given consideration to the past earnings but had allowed nothing on account of them because of his further assumption that defendant would cease giving its business to the Steamship Company and that there would not be other sufficient business available. He said "I did not use the earning record as an element in fixing the value; I had in mind that the company had been a big earner and yet under

the circumstances (his assumptions) could not use that element in fixing value.'' Another witness testified similarly and upon the same assumptions. He said, however, "I did not consider past earning power and I added nothing to the value because of that factor. I assumed that the Steel Company was not going to give'' the Steamship Company any traffic and assumed that the latter had no business and no opportunity to obtain profitable business. Upon this testimony and despite the fact that defendant company has continued at all times to operate the ships as heretofore and that those have carried the same freight as formerly, the master found that defendant had not appropriated anything belonging to plaintiffs as minority stockholders and that the value of such minority interests did not exceed their pro rata shares of the proceeds of sale of the ships. The court approved this finding.

Thus it appears from both plaintiffs' and defendant's testimony that if the Steamship Company had been considered a going concern and if its business might reasonably be expected to continue, the value of plaintiffs' stock would be in the neighborhood of $2000 per share.

That the master was misled in his reasoning is apparent from some of his findings. He said "the permitted participation in handsome returns for twenty-five years seems to me a very reasonable limitation for the duration of any such obligation.'' Obviously this is fallacious. It is not a question of how much profit plaintiffs and defendant have previously enjoyed from ownership of stock in the Steamship Company, but a question of what the existence of the transportation business of that company, which defendant has wrongfully taken, is now fairly worth. Henry Ford could not rightfully say to one of the stockholders who invested in the Ford automobile company in its beginning and whose investment had multiplied thousands of times in value, that in view of the handsome returns he had had upon the investment, he must deliver the stock to Mr. Ford upon receipt of his pro rata share of the value of the physical assets of the Ford Company or Mr. Ford would dissolve the company and bid in the assets and deprive him of any such returns.

After the sale of the physical assets, the proceeds were divided amongst the stockholders of the Steamship Company, each receiving his proportionate share. These were treated as liquidating dividends and as such plaintiffs

receipted for them. Defendant now contends that by acceptance of the distributive share of the proceeds of sale of the boats, plaintiffs are estopped to prosecute the present suit.

No estoppel arises upon these facts. Plaintiffs are suing, not to rescind the sale, but to recover a money judgment, alleged to be due them because of their damage incurred by the fraud of defendant. This demand is for something over and above and in addition to plaintiffs' proportionate share of the proceeds of liquidation of physical assets. Estoppel arises only when one has so acted as to mislead another and the one thus misled has relied upon the action of the inducing party to his prejudice. Shortly stated, one may not assume a position inconsistent with a former position to the prejudice of his adversary. *Texas Co.* v. *Gulf Refining Co.,* 5 Cir., 26 F. (2d) 394; Pomeroy Equity Jurisprudence, Sec. 804. It is the injury accruing from inducement or silent acquiescence which creates the estoppel. *Augustus* v. *New Amsterdam Casualty Co. of Baltimore,* 7 Cir., 100 F. (2d) 581; *Arkansas Natural Gas Corp.* v. *Sartor,* 5 Cir., 98 F. (2d) 527; *United States* v. *S. F. Scott & Sons,* 1 Cir., 69 F. (2d) 728; *Clark* v. *Fisher,* 2 Cir., 8 F. (2d) 588. Pomeroy, Equity Jurisprudence, Section 805, says: "The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. * * * He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

Plaintiffs did not remain silent. They brought their suit prematurely and this court affirmed its dismissal because of such prematurity, expressly stating, however, that the dismissal should be without prejudice to plaintiffs to complain if future developments should justify their fears. Defendant had the right under the statute of the state in which the Steamship Company was incorporated to work a dissolution. Following that it was bound to distribute the proceeds realized pro rata amongst the stockholders, but the receipt of such share in no wise affected the complaint of plaintiffs not that the sale should be rescinded but that in prosecuting the legal procedure of dissolution defendant had over-reached plaintiffs and damaged them. Their demand for damages was not in-

volved at all in their receipt of the pro rata shares of the proceeds of sale of the Steamship Company's boats. Plaintiffs did not acquiesce in or consent to perpetration of a fraud against them. Defendant has not been misled; it has not relied, to its injury or prejudice, upon any acquiescence or inducement on the part of plaintiffs.

Upon the record defendant is liable to plaintiffs. The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' damages.

The judgment is reversed for action by the District Court consistent with this opinion.

APPENDIX C.

The Third Opinion, Lebold v. Inland Steel Company (R. 172-176), decided June 16, 1943 (Reported With One Paragraph Deleted and Another Paragraph Added in 136 F. (2d) 876).

Before EVANS, KERNER, *Circuit Judges,* and LINDLEY, *District Judge.*

LINDLEY, *District Judge.* Both plaintiffs and defendant attack a judgment fixing plaintiffs' damages, in pursuance of our mandate in 125 F. (2d) 369, wherein the District Court found the value of capital stock of the Inland Steamship Company as a "going prosperous concern, continuing in business" on May 1, 1936 to be $2,350. per share. Plaintiffs assert that the evidence was such that the court could properly have fixed only a greater value. Defendant contends that the court could not rightly have attributed any value to the shares other than that of the physical assets; and, alternately, that, if additional value was to be considered, in view of the evidence, the amount fixed was excessive.

Defendant's first contention is grounded upon the premise that we were wrong in our conception of the law when the cause was last before us. Ordinarily, when a case has been once decided on appeal and remanded, whatever was before the court and disposed of by its decree is finally settled. *In re Sanford Fork and Tool Company,* 160 U. S. 247; *In re Potts,* 166 U. S. 263; *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. (2d) 577 (CCA7). Obviously, however, if we were wrong, we have a right to, indeed, we should, correct our error. *Am. Cyn. Company* v. *Wilson & Toomer Company,* 51 F. (2d) 665 (CCA5); *Brown* v. *Gesellschaft,* 104 F. (2d) 227 (C. A. D. C.); *Johnson* v. *Cadillac Motor Car Company,* 261 F. 878 (CCA2); *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. (2d) 577 (CCA7); *U. S. F. & G. Co.* v. *Com. Nat. Bank,* 62 F. (2d) 718 (CCA5). So, too, if the evidence now before us is such as to make inapplicable our previous announcements. With this in mind, aided by able advocates' earnest argument, we have examined again the principles of law

involved and found controlling on the previous record, in the light of not only what was previously presented but also of what was before the court upon the trial on the merits. After mature and deliberate consideration, we conclude that nothing now urged justifies any modification of our earlier announcement.

We have, then, the question of whether the allowance was excessive or inadequate.

The direct evidence as to value consisted of the testimony of expert witnesses supplemented by various charts and comparative analyses of other like and unlike corporations.

Plaintiffs' witnesses approached the problem from the investor's point of view, assuming a willing buyer and a willing seller, each equally well informed as to the facts. They supplied thirty-two charts demonstrating that the general trend of iron and steel production and shipments of ore on the Great Lakes were, in 1934 and 1935, on the upgrade, and that the ship company and defendant had made more rapid improvement than the industry in general. They included an exhaustive analysis of cargo rates, length of time the ship company's vessels were in commission, the average time of cargo runs, the number, gross tonnage and types of cargoes carried, total earnings, operating expenses, net earnings, operating ratio and net income from 1928 through 1934 and 1935, insofar as the figures were available.

Capitalizing the shares on the same ratio as the steel company's stock's quoted market prices bore to its earnings, they fixed the value in excess of \$3000 per share. Capitalizing them on the basis of \$150 dividends, on the same ratio as other quoted securities' market values bore to declared dividends, they thought the resulting value for a share of the ship company would be as follows: (1) on the basis of U. S. Government bonds, maturing or callable after 12 years, \$5689; (2) on the basis of 30 corporate Moody AAA bonds, \$4167; (3) on that of 30 similar AA bonds, \$3947; (4) on that of 30 "A" bonds, \$3505; (5) on that of 30 BAA bonds, \$2918 and (6) on the basis of stock of 120 corporations on the N. Y. stock exchange, \$3563; (7) on 120 bonds, classified by industry, 40 industrials, \$3886; 40 railroads, \$3348 and 40 public utilities, \$3505; (8) on common stocks, 14 industrial heavy industries, \$4000, 8 operating railroads, \$3488 and 16 leased railroads, \$2885. These values were proportionately increased when capital-

ized on the basis of annual earnings of $164 (the ratio actually existing January 1 to May 1, 1936) or $178 (average earnings in 1933, 1934 and 1935) or $192.03 (earnings for 1935) or $200, (as a projected future earning), the figures upon the last basis, $200, being as follows: on the basis of operating railroads, $3361, leased railroads, $3868, industrials, $4452 and Inland Steel Company, $3155. Among the corporations compared were: Ingersoll-Rand Company, International Harvester Company, Mesta Machine Company, General Electric Company, Pullman, Inc., General Motors, Diamond Match Company, United States Gypsum Company, Harbison-Walker Refractories Company, The Glidden Company, Otis Elevator, Firestone Tire & Rubber Company, The Timken Roller Bearing Company, Kennecott Copper Corporation.

Defendant, capitalizing eleven years' average earnings of the ship company at 10 per cent, computed the value of each share at $1289; using the years 1933, 1934 and 1935, on the same basis, its testimony was that the value was $1636.10; and, using the seven years, 1927 to 1935 inclusive (excluding both 1929 and 1932 as exceptional in two extremes), $1534.90. Defendant submitted also evidence of value upon the hypothesis that the existing traffic arrangement would continue for one year, its estimate being $714.13 per share, and, if the situation should remain unchanged for two years, $818.39 per share. Defendant also offered proof as to the earnings of other ship companies, engaged in independent business, over periods of eleven, seven, five and three years and attempted to demonstrate that, from a comparative viewpoint, the stock of the ship company was fairly worth $706 per share, on the seven years' earnings basis, and even less on the basis of the other periods. On the assumption that the traffic arrangement would have persisted for one year and that at the end of that time the Steel Company would have entered into competition with the ship company, defendant presented a computation of $779.25 per share.

The writer of this opinion has inclined toward the view that the evidence amply supports the District Court's finding as to damages, but the majority believes that the allowance was too liberal and in determining the soundness of that conclusion it is well to keep in mind that this is a suit in equity where the evidence is preserved for our reviewing examination. The testimony of the various expert witnesses was based upon the historical facts appearing in the

annals of the ship company and in the industrial and financial records of other corporations. Various theories of capitalization, based upon these facts, resulted in variant conclusions. The wide range of expert opinion covered valuations running from $224.90 to $3200 per share. Plaintiffs' witnesses gave emphasis to capitalization of past and projected earnings. Defendant's dwelt more largely upon earnings and capitalization of allegedly comparative carriers. It now directs our attention to the absence of contractual relation between the Steel Company and the ship company; the possibility of termination of all relationship and the probable earnings of the ship company, were the relationship dissolved, as a competitive contract carrier at prevailing rates. We think the court rightly considered the enlightening testimony offered by each party, but it is the conviction of the majority that too much credence was given to the rosy prognoses of plaintiffs and too little to the deterring elements cited by defendant. After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1350 each or an allowance of damages in excess of the difference between that value and the amount plaintiffs have received.

We think the District Court properly allowed interest at the rate of five per cent from May 1, 1936, inasmuch as defendant has been declared guilty of a breach of trust and plaintiffs have been deprived of their property from the time of such breach. *Golden* v. *Cervenka*, 278 Ill. 409; *Duncan* v. *Dazey*, 318 Ill. 500; *Southern Pacific Ry.* v. *Bogert*, 250 U. S. 483; *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625; *American Seating Co.* v. *Bullar*, 290 Fed. 896; 2 Scott, Trusts, 1107; 4 Bogert, Trusts and Trustees, 2502.

The judgment will be reversed and remanded with directions to the District Court to render judgment in accord with the announcements herein contained.

APPENDIX D.

The Fourth Opinion, Lebold v. Inland Steel Company (R. 223), Decided July 16, 1943 (Reported as a Part of the Second Opinion in 136 F. (2d) 876).

UPON PETITIONS FOR REHEARING.

Apparently there is confusion upon the part of one of the parties to the effect that it was the intent of our opinion that judgment be reversed and the cause remanded for a new trial. Such was not our intention. Accordingly, to remove any ambiguity, the last paragraph of the opinion is hereby deleted. The court modifies the judgment of the District Court by reducing plaintiffs' damages to the difference between what they have received and Thirteen Hundred Fifty Dollars ($1350) for each share of stock held by them respectively, together with costs in the District Court and interest at the rate of 5% from May 1, 1936. Thus modified, the judgment is affirmed. Each party shall pay one-half the costs in this court.

The petitions for rehearing are denied.

Draft judgment computing and fixing the total damages may be submitted.